IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI

SECOND APPEAL NO. 29 OF 2001

1. Mr. Gustav Agnelo Mergulhao,
Service, and his wife.

2. Eliza da Conceicao Mergulahao,
Housewife, both residing at
H.No.160, next to St.Sebastian
Chapel, Patrong,
Vasco-da-Gama, Goa. ... Appellants.

versus

1. Smt. Ida Julia Vizarta
Figueredo Mergulhao,
Widow, Housewife(expired),
represented through Legal
Representatives:

1a. Smt. Francisca Mergulhao
e Luis, Major in age,
housewife,

1b. Miss Maria Mergulhao,
major in age,

1c. Miss Catherine Mergulhao,
major in age,

1d. Miss Beatriz Mergulhao,
major in age,
all presently residing
near Our Lady of Fatima
Church, Sewri Cross Road,
Sewri, Mumbai-400 015.

2. Mr. Bosco Santan Oscar
William Mergulhao,
married, service and his
wife,

3. Smt. Saira Antoniette D'Silva
Mergulhao, housewife, all
presently residing near
Our Lady of Fatima Church,
Sewri, Mumbai-400 015.

4. Sayed Harun, Tresvilla,
Mangor Hill,
Vasco-da-Gama, Goa. ... Respondents.

Mr. S. S. Kantak with Miss Rakhi M. Chodankar, Advocates for the Appellants.

Mr. S. N. Kerkar with Mr. V. Pangam, Advocates for the Respondents No.1(a to d), 2 and 3.

CORAM: P. V. HARDAS, J.

DATED: 5TH OCTOBER,2002.

ORAL JUDGMENT

Notice before Admission was issued to the Respondents on the following substantial questions of law:-

1. Whether Regular Civil Suit No.62/1985/C is barred under Order 9 Rule 9 C.P.C. in view of dismissal for default of R.C.S. No.91/76.

2. Whether Courts below failed to exercise jurisdiction to decide issue no.4 r/w Order dated 24/6/1997.

2. By consent of parties, this Appeal was taken up for final disposal at the stage of Admission and accordingly Records and Proceedings from the Courts below were called for.

3. The Appellant in the present Second Appeal is an unsuccessful Defendant in the two Courts below who now seeks to agitate the substantial questions of law raised in the Memo of Appeal before this Court.

4. I have heard Mr. S. S. Kantak, the learned Counsel appearing for the Appellants and Mr. S. N. Kerkar, the learned Counsel appearing for the Respondents No.1(a to d), 2 and 3. The Respondent No.4 in the present Appeal is the Original Defendant No.3 in the suit, who has chosen not to put in appearance despite being served. The present Respondent No.4 was also proceeded ex-parte in the suit before the learned Trial Court. The Respondent No.4 was served and the Office endorsement dated 11th March, 2002 states that Respondent No.4 has been duly served.

5. Mr. S. S. Kantak, the learned Counsel appearing for the Appellants invited my attention to the Issues which were framed by the learned Trial Court on the pleadings of the parties. The said Issues are reproduced hereunder-

	I S S U E S	**FINDINGS**
1).	Whether the plaintiffs prove that the suit garage was constructed in 1965, by her late husband?	Not proved.
2).	Whether the plaintiffs prove that the suit garage was in their possession and that defendant no.1 and 2, illegally leased to the defendant no.3 ?	Proved.
3).	Whether the plaintiffs prove that they are entitled for mesne profit	

	at the rate of Rs.500/- p.m. and Rs.1000/- per month as damages to be recovered with interest at the rate of 15% p.a. from the date of the suit?	Proved.
4).	Whether the defendant no.1 and 2 prove that the suit is barred by the principle of res-judicata, in view of the earlier suit 91/76?	This issue was taken up as preliminary issue and vide order dated 11.4.89 passed by my predecessor was answered as Negative. (Not proved).
5).	Whether the defendant no.1 prove that shop was constructed by him, and that he is the legal owner of the same?	Not proved.
6).	Whether the defendant no.3 proves that this Court has no jurisdiction to try this suit as he is the tenant of defendant no.1 and 27?	Not proved.
7).	Issues No.4 and 6 were tried as preliminary issues?	

6. Mr. S. S. Kantak, the learned Counsel appearing for the Appellants has urged before me that Issue No.4, which was directed to be tried as a preliminary issue, vide Exh.14, goes to the root of the jurisdictional aspect of the Court and according to him, if Issue No.4 had

been answered by the Court, the suit of the Plaintiff would be hit by Order 9 Rule 9 of the Civil Procedure Code.

A perusal of the finding recorded by the Court shows that the learned Trial Court has held that Issue No.4, which had been taken up as a preliminary issue, had been answered in the negative by the Order of the learned Trial Court dated 11th April, 1989.

7. The learned Trial Court by Order dated 11th April, 1989, has no doubt held that the suit was to proceed according to law and Issue No.4 was answered in the negative. However, with the assistance of the learned Counsel appearing for the parties, I had perused the Order of the learned Trial Court dated 11th April, 1989. In paragraph 4 of the Order(paragraph 4 as such is not numbered), the learned Trial Court had examined the rival contentions of the parties. So also, in paragraph 5, the learned Trial Court after examining the contentions of the parties holds "in the circumstances it cannot be said "at this stage" that the present suit is hit by principles of res-judicata and the same must be dismissed". (Emphasis supplied).

8. Thus, according to the learned Counsel appearing for the Appellants, the learned Trial Court while taking up Issue No.4 for consideration found that in view of the

pleadings of the parties, it could not be said that at that stage, the suit was hit by principles of res-judicata. This obviously means that the learned Trial Court intended to answer the issues after the parties led their evidence. However, Issue No.4, is answered in the negative.

9. Probably, as a sequel to the decision of the learned Trial Court dated 11th April, 1989, the present Appellants/Defendants filed an application before the learned Trial Court for framing of additional issues. The Original Plaintiffs vide Exh.40 filed their reply to the said application. The Respondents/Original Plaintiffs in their reply contended that the framing of the additional issue was sought at the fag end of the trial and the said application had been filed only to delay the proceeding. It was also urged before the learned Trial Court that the issues were settled on 28th January, 1987 and Issue No.4 has been framed and, therefore, urged the learned Trial Court to dismiss the application. The learned Trial Court by its Order dated 24th June, 1997, dismissed the application of the Appellants/Defendants for framing of the additional issue. The additional issue which was sought to be framed was whether the suit was barred by Order 9 Rule 9 of the Civil Procedure Code as the previous suit bearing Civil Suit No.91 of 1976 filed by the Plaintiff had been dismissed for default on 15th February, 1980. The learned

Trial Court while examining the necessity of the framing of the additional issue observed in para 6 of its Order, referred to above, after quoting Issue No.4 that since Issue No.4 had been framed and substantially covered the additional issue, the Court was of the opinion that it was not necessary to frame the additional issue since Issue No.4 was already there. It appears that the learned Trial Court was oblivious of the Order dated 11th April, 1989. It also appears that the parties were oblivious of the Order dated 11th April, 1989 by which, the learned Trial Court answered the Issue No.4 in the negative. The said Order of the learned Trial Court dated 24th June, 1997 came to be challenged at the behest of the present Appellants/Defendants by filing Civil Revision Application No.105 of 1997. When the said application came up for Admission before this Court, this Court by Order dated 14th November, 1997, rejected the said application by observing that the learned Trial Court had rightly refused the same. It is necessary to observe at this stage that the learned Trial Court had refused to frame the additional issue as Issue No.4 had already been framed which covers the additional issue.

10. Mr. S. N. Kerkar, the learned Counsel appearing for the Respondents/Original Plaintiffs has urged before me that there is no substantial questions of law

which is involved in the present Second Appeal and the Second Appeal, therefore, needs to be dismissed.

11. I have given my anxious considerations to the rival contentions advanced before me. According to me, by the Order dated 11th April, 1989, it cannot be said that the learned Trial Court has addressed itself and has decided Issue No.4. It appears that the learned Trial Court was of the view that in view of the pleadings of the parties at this stage, the learned Trial Court could not come to the conclusion that the suit was barred by principles of res-judicata. The learned Trial Court by Order dated 24th June, 1997, declined to frame the additional issue on the ground that Issue No.4 was also pending for adjudication and the proposed additional issue was substantially covered by Issue No.4 and hence the request of the Defendants was turned down. Though, this point was specifically urged before the learned lower appellate Court as is evident from the grounds 11 and 12 of the Memo of Appeal, the learned lower appellate Court has not addressed itself to the grounds which were urged before him. Undisputedly, the Issue No.4 goes to the very root of the matter i.e. regarding the maintainability of the suit. The learned Trial Court ought to have decided the issue on the basis of the evidence of the parties. The learned Trial Court expressed its inability in deciding the suit and rightly so. However, the learned Trial Court without

waiting for the evidence to be recorded decided the issue in the negative. An issue which goes to the root of the matter and if the same has not been decided by a Court particularly in view of the fact that the Court found it inappropriate to decide an issue only on the basis of the pleadings according to me is a substantial question of law which may be urged in a Second Appeal. In the absence of any positive finding in respect of Issue No.4, the findings of the Court on other issues according to me, pales into insignificance and the Court which was conferred with the jurisdiction has failed in deciding Issue No.4.

12. Mr. S. N. Kerkar, the learned Counsel appearing for the Respondents/Plaintiffs has urged before me that in the event this Court remits the matter back to the learned Trial Court, the parties may be afforded an opportunity of leading evidence, if so desired.

13. Mr. S. S. Kantak, the learned Counsel appearing for the Appellants also urged before me that the Court should examine the proposed question whether the proposed additional issue which was urged before the Court, is required to be framed and if the learned Trial Court does find the necessity of framing the issue, the party can be afforded an opportunity of leading evidence.

14. In view of what has been held above, I am of the considered opinion that the Second Appeal deserves to be allowed and the Judgment and Decree of the learned Trial Court as well as of the learned lower appellate Court deserves to be quashed and set aside and the matter needs to be remitted back to the learned Trial Court for decision on merits on Issue No.4 and on the additional issue which was proposed by the Defendants.

15. Mr. S. N. Kerkar, the learned Counsel appearing for the Respondents/Plaintiffs has submitted before me that he has no objection to the framing of the additional issue as proposed by the Appellants/Defendants. The learned Trial Court shall accordingly frame the additional issue.

16. The Appellants/Defendants in pursuance of the Order of this Court dated 14th March, 2002, had directed the Appellants/Defendants to deposit the mesne profits in the Executing Court. Since the Judgment and Decree of the two Courts below has been quashed and set aside, the Appellants/Defendants shall be at liberty to withdraw the amount so deposited.

17. The Second Appeal is, therefore, accordingly allowed. The Judgment and Decree of the learned Trial Court dated 30th July, 1998 and the Judgment and Decree of

the learned lower appellate Court dated 18th August, 2000 is hereby quashed and set aside. The matter is remitted back to the learned Trial Court for decision on Issue No.4 and the additional issue as proposed by the Appellants/Defendants. The learned Trial Court shall afford an opportunity to the parties to lead evidence to prove these two issues only if the party so desires and pronounce its decision on merits on all the issues within six months of the receipt of the Record and Proceedings from this Court. It is expected that the learned Trial Court shall strictly adhere to the limit of six months in deciding the Appeal.

18. Second Appeal is accordingly allowed with the above directions with no order as to costs.

P. V. HARDAS, J.